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Supreme Court of the United States

October Term 1947

No. 592

COMMONWEALTH OF KENTUCKY, . Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY, ... Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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COMMONWEALTH OF KENTUCKY.....*Petitioner*

vs.

ILLINOIS CENTRAL RAILROAD COMPANY.....*Respondent*

SUMMARY STATEMENT OF MATTER INVOLVED

This case concerns the validity under the Federal Constitution of a portion of the election laws of Kentucky and is the first test of the validity of that law or a similar law to reach this Court.

This case has been before the Kentucky Court of Appeals twice, and there are two transcripts of the record. In this petition "R 1" refers to the transcript in the first case, and "R 2" to the transcript in the second case.

In 1892, the Kentucky General Assembly passed Chapter 65, Article XIII, section 9, which is now section 118.340 of the Kentucky Revised Statutes; it was passed pursuant to section 148 of the Kentucky Constitution of 1891, which reads as follows:

> *"Number of elections; day and hours of election; election years; qualifications of officers; employees to*

be given time to vote. Not more than one election each year shall be held in this State or in any city, town, district, or county thereof, except as otherwise provided in this Constitution. All elections of State, county, city, town or district officers shall be held on the first Tuesday after the first Monday in November; but no officer of any city, town, or county, or of any subdivision thereof, except members of municipal legislative boards, shall be elected in the same year in which members of the House of Representatives of the United States are elected. District or State officers, including members of the General Assembly, may be elected in the same year in which members of the House of Representatives of the United States are elected. All elections by the people shall be between the hours of six o'clock a. m. and seven o'clock p. m., but the General Assembly may change said hours, and all officers of any election shall be residents and voters in the precinct in which they act. The General Assembly shall provide by law that all employers shall allow employees, under reasonable regulations, at least four hours on election days, in which to cast their votes."

The 1892 Act had not been challenged until 1945, in spite of its importance and far-reaching nature. We quote it in its present form:

"*Employes to be allowed time off to vote.* Any person entitled to a vote at any election in this state shall, if he has made application for such leave prior to the day of election, be entitled to absent himself from any services or employment in which he is then engaged or employed for a period of four hours on the day of the election, between the time of opening and closing the polls. Such person shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages. The employer may specify the hours during which the employe may absent himself. No person shall refuse an employe the privilege hereby conferred, or discharge or threaten to discharge an employe or subject an employe to a penalty or deduction of wages because of the exercise of the privilege."

KRS 118.990 (4) imposes a penalty of not less than fifty nor more than five hundred dollars for any violation of this Act.

Petitioner is the Commonwealth of Kentucky and respondent is the Illinois Central Railroad Company, a corporation organized under the laws of Kentucky and doing business in Kentucky and several other states. .

At the regular election, November 7, 1944, one W. K. Wall, an employee of respondent, whose regular wages as fixed by contract between his union and respondent were $1.04 an hour, was absent from his work for approximately two hours and during that time he voted. He was not paid for the time during which he was absent and because of the diminution of his wages in the amount of $2.08 and the diminution of the wages of other employees similarly situated, respondent was indicted in the McCracken Circuit Court for violating KRS 118.340 (R 1, page 4). The November 1944 election was one in which presidential electors, a United States Senator, and a Member of the House of Representatives were elected.

Respondent demurred to the indictment, which the McCracken County grand jury had found against it, on the ground that the facts alleged in the indictment were not sufficient to constitute an offense denounced by KRS 118.340 and were not sufficient to constitute any public offense (R 1, page 14). The demurrer was overruled and respondent, after excepting, pleaded not guilty. Respondent moved (R 1, page 14) that the court give the jury a peremptory instruction in its favor and, as grounds for the instruction, argued that the indictment did not charge the commission of a public offense; that KRS 118.340 violated sections 2, 6, 13, 19, and 26 of the Kentucky Constitution; that it discriminated against legal voters and employers by requiring employers to pay employees for the time taken off for voting by employees who had made application prior to election day to absent themselves, and were absent from

their employment during the time between the opening and closing of the polls; that it sought to deprive an employer of property without due process of law and devote property taken from him to public use without just compensation; that it conflicted with the Fourteenth Amendment in that it sought to protect unequally an employee against loss of time in attending the polls on election days; that it denied the same or equal protection to employers and penalized the employer by requiring him to furnish the money that protected the employee against such loss; that it deprived an employer of property without due process of law; and that it abridged the privileges or immunities of citizens of the United States. The motion was overruled (R 1, page 15).

Failure of the court to give such an instruction was assigned as error in respondent's bill of exceptions (R 1, page 21).

Respondent was convicted of violating the statute and fined one hundred dollars (R 1, page 15).

Respondent moved to set aside the verdict and to grant to it a new trial (R 1, page 17), on the grounds, among others, that the court failed to give a peremptory instruction in its favor; that the statute discriminated against legal voters and employers by requiring employers to pay employees for the time the employees were engaged in voting; that it violated the Fourteenth Amendment; and that it deprived respondent and all employers of employees entitled to vote at any election, of property without due process of law by requiring the employers to pay voting employees wages and salary not earned, and took from respondent and other employers, property without just compensation. This motion was overruled (R 1, page 18).

An appeal was taken to the Kentucky Court of Appeals, where both respondent and the petitioner, through its Attorney General, argued not only the sufficiency of the indictment but the constitutionality of KRS 118.340 under both the Kentucky and Federal Constitutions. The Court of

Appeals declined to decide the case on constitutional grounds but remanded the case to the McCracken Circuit Court (R 1, page 34), giving as its reason that the indictment was defective for not alleging that the employee was eligible to vote in the November 1944 election; that he was absent between the time of opening and closing of the polls on election day, and that he applied to the employer for leave on the day prior to the election (Illinois Central R. R. Co. v. Com., 300 Ky. 817, 190 S.W. (2d) 555, which adopted the reasoning of the companion case of International Shoe Co. v. Com., 300 Ky. 806, 190 S.W. 553). Back in the circuit court, the indictment was amended (R 2, page 4) and both the Commonwealth and respondent filed an agreed stipulation, according to which (R 2, page 6) the action was submitted to the court without the intervention of a jury, respondent made the same defenses and pleas as on the previous trial, including a demurrer and a plea of not guilty, and the testimony in the first case was made a part of the record in the second case. The stipulation further stated that if the court should find the respondent guilty respondent should appeal to the Court of Appeals, and all indictments other than the one upon which the Commonwealth relied should be dismissed on the condition that the respondent should pay to employees named in the indictment, the wages alleged to have been withheld from them. If respondent should lose upon the final determination of the case, a typical case should be selected to determine if a primary election is an election within the meaning of KRS 118.340.

The McCracken Circuit Court found respondent guilty of violation of KRS 118.340 and again imposed on respondent a fine of one hundred dollars for making an unlawful deduction from the wages of W. K. Wall (R 2, page 9).

Respondent in a motion and grounds for a new trial (R 2, page 10) moved to set aside the judgment for the

reason, among others, that KRS 118.340 was unconstitutional and void, because it was discriminatory against legal voters and employers in that it attempted to require employers to pay employees for the time employees were engaged in voting, and because it violated the Fourteenth Amendment to the Federal Constitution and Section Two of the Kentucky Constitution. This motion was overruled (R 2, page 9), and the action of the court was noted in the bill of exceptions (R 2, page 15).

Again respondent appealed to the Kentucky Court of Appeals and the case was argued at great length by both briefs and oral argument on the constitutional issues. On June 3, 1947, the Court of Appeals of Kentucky reversed the judgment of the McCracken Circuit Court and held that KRS 118.340 violated the Fourteenth Amendment to the United States Constitution and Section Two of the Kentucky Constitution, insofar as it required employees to be paid for the time during which they left their work in order to vote (Illinois Central R. R. Co. v. Com., 305 Ky. 632, —S.W. (2d)—). The court declared that such requirement was a deprivation of property without due process of law and the denial of equal protection of the laws under both the State and Federal Constitutions (R 2, page 28).

The Attorney General thereupon filed a petition for rehearing (R 2, page 41), arguing that KRS 118.340 did not violate the Fourteenth Amendment to the Federal Constitution or Section Two of the Kentucky Constitution; that those two constitutional sections were, for the purposes of this case, coextensive; that conviction of respondent for violation of KRS 118.340 concerned acts done on election day of 1944, at which time presidential electors, a United States Senator, and a Member of the United States House of Representatives were elected; that the charter of respondent, a private corporation, was subject to revocation by the General Assembly of Kentucky and that in the exercise of its inherent police power the state might protect the

right of franchise by requiring that those employees who took time off in which to vote should not suffer diminution of their regular wages.

The petition for rehearing was overruled on November 14, 1947 (R 2, page 43).

Petitioner is now filing with this court a petition for writ of certiorari to reverse the decision of the Kentucky Court of Appeals.

QUESTIONS PRESENTED

Briefly stated, the main question is, whether a state may require an employer to compensate his employee in his regular wages for time taken off in order to vote, provided the employee absents himself at a reasonable time and under the reasonable regulations of the employer; in other words, may a state require an employer to allow his employee to absent himself in order to vote, without subjecting him to any diminution of wages?

JURISDICTIONAL STATEMENT

The Commonwealth of Kentucky invokes the jurisdiction of the Supreme Court of the United States to entertain a petition for writ of certiorari to the Court of Appeals of Kentucky by authority of 28 United States Code 344, section 237 of the Judicial Code, and Rule 38 of the Rules of the Supreme Court.

Section 344 of the United States Code states that the Supreme Court may by certiorari require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which is drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States.

A writ of certiorari is sought because, according to Rule 38 (5) of the Rules of the Supreme Court, this court may issue such a writ "where a state court has decided a

federal question of substance not theretofore determined by this court or has decided it in a way probably not in accord with the applicable decisions of this court."

On June 3, 1947, the Court of Appeals ruled invalid against both the Federal and State Constitutions, section 118.340 of the Kentucky Revised Statutes, and on November 14, 1947, it denied a petition for rehearing. That statute is quoted in full on page 2 of this petition.

Here, the Kentucky Court of Appeals has decided a federal question of substance not heretofore determined by the Supreme Court of the United States. The question becomes a federal one because the Court of Appeals has based its decision upon the Fourteenth Amendment to the Federal Constitution, declaring that KRS 118.340 deprives respondent of property without due process of law and denies it the equal protection of the laws. The Supreme Court of the United States is the final authority on the interpretation of the Federal Constitution.

The Court of Appeals has also relied upon Section Two of the Kentucky Constitution which is as follows:

> "*Absolute and arbitrary power denied.* Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

The Kentucky Court of Appeals in the case of Carolene Products Co. v. Hanrahan, 291 Ky. 417, 164 S.W. (2d) 597, has held that Section Two covers substantially the same territory as the Fourteenth Amendment to the Federal Constitution. The Federal and State questions are therefore so closely related that they cannot be separated.

This court may also take jurisdiction because respondent has been convicted of violating KRS 118.340 in an election in which presidential electors, a United States Senator,

and a Member of the National House of Representatives were chosen. The right to vote in such an election is protected in Article I, sections 2 and 4, of the Fourteenth Amendment to the United States Constitution, and the conviction of respondent was for violation of a statute designed to protect such a right. In subjecting its employee to a reduction in wages for exercising a right protected by the Constitution of the United States, respondent has created a federal question. This Federal question was brought to the attention of the Court of Appeals of Kentucky in petitioner's oral argument before the decision was handed down and in petitioner's petition for a rehearing.

The Commonwealth of Kentucky petitions for a writ of certiorari on this the 15th day of December, 1947.

REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT

This case presents questions of the first instance relating to the constitutionality of a Kentucky statute which has been on the books for fifty-six years and which has not heretofore been passed upon by this court. Conflicting decisions on a similar point have been given by the Supreme Court of Illinois and the Appellate Division of the Supreme Court of New York and because other states have statutes covering the same subject matter, an early decision of this question by the Supreme Court of the United States is of great importance. It will be of interest to employers of labor as well as to employees. It is quite possible that within a few years other state courts will have to decide the same question and we think the issuance of a writ of certiorari by this court and the decision will help to clear the air.

The Court of Appeals of Kentucky has erred in declaring that a state may not safeguard the right of franchise by prohibiting diminution of wages for time during which an employee takes time off to vote provided, of course, he gives

the employer reasonable notice and complies with the employer's reasonable regulations.

It has erred in stating that such a statute deprives an employer of property without due process of law and denies to him the equal protection of the laws.

It has erred in that it has not protected the right of an employee to participate in a federal election, a right which is guaranteed by Article I, sections 2 and 4, and the Fourteenth Amendment of the Federal Constitution.

Cases believed to sustain the jurisdiction of the Supreme Court of the United States are Abie State Bank v. Bryan, 281 U. S. 765, 75 L.Ed. 690, 51 Sup. Ct. 252; Patterson v. Alabama, 294 U. S. 602, 79 L.Ed. 1083, 55 Sup. Ct. 576; Indiana ex rel. Anderson v. Brand, Trustee, 303 U. S. 99, 82 L.Ed. 690, 58 Sup. Ct. 445; State Tax Commission v. Van Cott, 306 U. S. 511, 83 L.Ed. 952, 59 Sup. Ct. 606; Carolene Products Co. v. Hanrahan, 291 Ky. 417, 164 S.W. (2d) 597.

WHEREFORE, the petitioner, the Commonwealth of Kentucky, by and through its Attorney General, prays that a writ of certiorari be issued out of and under the seal of this honorable court, directed to the Court of Appeals of the Commonwealth of Kentucky, commanding that court to certify and send to this court for its review and determination on a day set to be therein named a transcript of the record and proceedings herein; that the judgment of the Court of Appeals of the Commonwealth of Kentucky be reversed by this honorable court and that the petitioner have such other and further relief in the premises as to this honorable court may seem just.

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No. 592

COMMONWEALTH OF KENTUCKY . Petitioner

vs.

ILLINOIS CENTRAL RAILROAD COMPANY . . . . . Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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INTRODUCTION

This brief is submitted by the Commonwealth of Kentucky in support of its petition for writ of certiorari to the Kentucky Court of Appeals to review the decision rendered by that court in the case of Illinois Central Railroad Company v. Commonwealth of Kentucky, 305 Ky. 632, ... S. W. (2d) .....; a previous decision had been handed down in Illinois Central Railroad Company v. Commonwealth of Kentucky, 300 Ky. 817, 190 S. W. (2d) 555.

Jurisdiction of this court is invoked because the Court of Appeals of Kentucky, the highest appellate court of that state, has decided a federal question of substance not heretofore determined by this court and in a way probably not in accord with the applicable decisions of this court (24 U. S. Code 344, Rule 38 of Rules of Supreme Court). That federal question is the validity of section 118.340 of the Kentucky Revised Statutes under the Fourteenth Amend-

ment to the United States Constitution. The Court of Appeals has ruled that that statute deprives respondent of property without due process of law and denies him equal protection of the laws. As the final authority on interpretation of the United States Constitution, this court has jurisdiction.

Jurisdiction is also invoked because respondent had been convicted of violating KRS 118.340 in an election at which presidential electors, a United States Senator, and a Member of the Federal House of Representatives were chosen. The right to participate in such an election is one guaranteed by Article I, sections 2 and 4 (United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 88 L.Ed. 1368, rehearing denied 314 U. S. 707, 62 S. Ct. 51, 86 L.Ed. 565), and the Fourteenth Amendment (Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L.Ed. 987), of the United States Constitution, and KRS 118.340 had been passed to protect that right as well as the right to take part in state and local elections. By violating KRS 118.340 respondent has impaired the right of franchise, because it subjected its employee to a diminution of his regular wages; it impinged upon a right granted him by the United States Constitution.

Briefly, we outline the facts of this case. In 1892, the General Assembly of Kentucky passed Chapter 65, Article XIII, Section 9 of the Acts of 1892, which is now section 118.340 of the Kentucky Revised Statutes. It reads as follows:

> "Any person entitled to a vote at any election in this state shall, if he has made application for such leave prior to the day of election, be entitled to absent himself from any services or employment in which he is then engaged or employed for a period of four hours on the day of the election, between the time of opening and closing the polls. Such person shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages. The employer may

specify the hours during which the employe may absent himself. No person shall refuse an employe the privilege hereby conferred, or discharge or threaten to discharge an employe or subject an employe to a penalty or deduction of wages because of the exercise of the privilege."

In the election of November 7, 1944, at which presidential electors, a United States Senator, and a Member of the House of Representatives were chosen, one of the employees of respondent, one W. K. Wall, was absent from his work for approximately two hours, and during that time he voted. According to the contract between Wall's union and respondent, he was to be paid $1.04 an hour for the hours worked (Tr. E., page 14). Because he had absented himself in order to vote, his wages were reduced for that particular day by $2.08. A number of other employees were involved in the same situation, but a test case was made of W. K. Wall. Respondent was indicted for violating KRS 118.340 (R 1, page 4) and at appropriate points during the trial, he asserted that the statute violated the Federal Constitution and the Kentucky Constitution. Respondent was convicted and the constitutional issues argued at great length before the Kentucky Court of Appeals, to which the case had been taken. That court, however, declined to decide the case on constitutional grounds and remanded it to the circuit court because of technical defects in the indictment (R 1, page 34; Illinois Central Railroad Co. v. Commonwealth of Kentucky, 300 Ky. 817, 190 S. W. (2d) 555). In the lower court, the indictment was amended to comply with the decision of the Court of Appeals (R. 2, page 4) and again the question of constitutionality was brought up. Once more, the circuit court found respondent guilty (R. 2, page 9) and respondent appealed to the Court of Appeals. Both sides argued constitutional points and on June 3, 1947, the Court of Appeals reversed the judgment of the circuit court on the ground that KRS 118.340 violated Section Two of the

Kentucky Constitution and the Fourteenth Amendment to the Federal Constitution (R. 2, page 28). It reasoned that the police power of the state did not extend so far as to allow the prohibition of a diminution of wages of an employee who was paid by the hour and took time off to vote. It said further that such a prohibition was a deprivation of the property of an employer without due process of law and the denial to him of equal protection of the law and that the requirement that an employee be paid for time taken off to vote would amount to taking property from one person and giving it to another without just cause.

Petitioner filed a petition for rehearing (R. 2, page 41), arguing that, for the purposes of this case, Section Two of the Kentucky Constitution and the Fourteenth Amendment of the United States Constitution are virtually identical; that the police power extended to the protection of the right of franchise; that KRS 118.340 was not a penalty on the employer, but an attempted equalization of status, intended to prevent discrimination against employees; that respondent held a corporate charter from the Commonwealth of Kentucky and that the Commonwealth might alter or revoke that charter; and that prohibition of the diminution of wages for taking time off to vote was not a deprivation of property without due process of law or a denial of equal protection of the laws. Petitioner's petition for a rehearing was overruled by the Court of Appeals on November 14, 1947 (R. 2, page 43).

The Court of Appeals of Kentucky has erred in reversing the judgment of the McCracken Circuit Court and in declaring that the "wage-payment-for-voting-time" provisions of KRS 118.340 are antagonistic to the Fourteenth Amendment to the United States Constitution.

It has erred in holding that the prohibition against diminution of wages for taking off time to vote arbitrarily interferes with private business.

It has erred in denying that the prohibition against diminution of wages is a legitimate exercise of the police power of the state.

It has erred in stating that the prohibition takes property away from one person and gives it to another without value received or without contractual basis.

It has erred in saying that the prohibition is a private maintenance of a public enterprise.

ARGUMENT

We think the Kentucky Court of Appeals has erred in holding that KRS 118.340 violates the Fourteenth Amendment to the Federal Constitution, and are therefore requesting this court to issue a writ of certiorari to the Kentucky court to bring the record up for examination and then reverse the Kentucky decision.

Our argument is directed first at the jurisdiction of this court, and then at the merits of the question.

I. SUMMARY

The Supreme Court has jurisdiction to issue a writ of certiorari to the Court of Appeals of Kentucky because the latter has decided a federal question of substance not heretofore determined by this court.

In actuality, there are two federal aspects to this case, either one of which is sufficient to justify the assumption of jurisdiction by this court.

(1) The Court of Appeals has declared that KRS 118.340 violates the Fourteenth Amendment to the United States Constitution. True, the court has based its decision also upon Section Two of the Kentucky Constitution, but in a previous decision it has stated that Section Two of the Kentucky Constitution covers virtually the same ground as the Fourteenth Amendment. The federal question is so interrelated with the interpretation of the State Constitution that it is impossible to separate the two. Under

the ruling of Abie State Bank v. Bryan, 281 U. S. 765, 51 S. Ct. 252, 75 L.Ed. 690, this court should not hesitate to take jurisdiction.

(2) Respondent was convicted of violating KRS 118.340 in an election at which presidential electors, a United States Senator, and a Member of the Federal House of Representatives were chosen. The right to vote in federal elections is a right guaranteed the citizens of the United States (Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L.Ed. 97) and by unlawfully making a deduction from the wages of its employee who voted in a federal election, respondent impaired that right. The Commonwealth of Kentucky is certainly interested in the protection of that right and can safeguard it through such means as KRS 118.340.

Once this court has taken jurisdiction, it will face the substantive question: Can a state require an employer to pay his employees for the time which they take off from their work in order to vote, provided the employees give reasonable notice and absent themselves under reasonable regulations? Or, to put it another way, can a state prohibit an employer from reducing the regular wages of an employee who absents himself from his job—under reasonable regulations of the employer—in order to vote?

We think that a state has that power and that in enacting KRS 118.340 the state has exercised that power. In so doing, it has not deprived the respondent of property without due process of law or denied him equal protection of the laws. It is simply recognizing a principle that many other courts have recognized—that the right to vote is a personal and political right which the state can protect and that the police power of the state, embracing as it does the general welfare, extends to the right of franchise.

II. THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO ISSUE A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

A. The Fourteenth Amendment to the Federal Constitution and Section Two of the Kentucky Constitution are for the purposes of this case identical.

It will no doubt be argued that this court has no jurisdiction because the Kentucky Court of Appeals has declared KRS 118.340 invalid as against not only the Federal Constitution (Fourteenth Amendment) but the State Constitution (Section Two) as well. Reference will probably be made to that well-established principle of this court that the Supreme Court will not consider the validity of a state statute if it has already been declared by the highest state court to be in contravention of the State Constitution.

Such an argument falls before the reasoning of this court in the 1931 case of Abie State Bank v. Bryan, 281 U. S. 765, 51 S. Ct. 252, 75 L.Ed. 690, which declared that the validity of a state statute would be considered if the state and federal questions were inextricably interwoven. That is the case here. The Kentucky Court of Appeals invalidated the statute because of both constitutions, but it gave the same reasoning for both. If the Kentucky Court of Appeals had not mentioned the State Constitution at all, the situation would be no different, because Section Two is the Kentucky equivalent of the Fourteenth Amendment.

The Kentucky Court of Appeals has fully recognized the virtual identity of these constitutional provisions. In Carolene Products Company v. Hanrahan, 291 Ky. 417, 164 S. W. (2d) 597, a Kentucky statute prohibited the manufacture or sale of any filled milk, defined as milk, cream or skimmed milk to which had been added any fat or oil other than milk fat, so that the resulting products would be an imitation or semblance of milk, cream or

skimmed milk. An injunction was brought against the commonwealth's and county attorneys to prevent enforcement on the ground that the act violated the Fourteenth Amendment to the Federal Constitution and Sections One, Two, Three, Five, Thirteen, Fourteen, and Twenty-eight of the Kentucky Constitution. In holding that there was no violation, the court recognized that both Constitutions covered the same ground. It said, on page 424:

> "While the Supreme Court decision had no binding effect on us on this question, we are in thorough accord with the reasoning of that opinion and, since the aggregate effect of the restraints imposed on state legislative action by the provisions of the state constitution relied on are in substance the equivalent of the restraints imposed on the states by the 14th Amendment in so far as this controversy is concerned, it is our opinion also that the Act is not violative of the Kentucky Constitution."

The Fourteenth Amendment covers virtually the same territory as Section Two of the Kentucky Constitution, which we now quote for the convenience of the court:

> "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

As indicative of the trend of the decisions of the Kentucky Court of Appeals, we refer to the 1932 case of City of Corbin v. Hays, 244 Ky. 33, 50 S. W. (2d) 31, in which a city ordinance allowing the city council to declare a building to be a public nuisance and then summarily close the place, was attacked. The court, without distinguishing the Fourteenth Amendment to the federal constitution from Section Two of the Kentucky Constitution, declared that the ordinance violated both constitutions.

If the ruling of the Kentucky Court of Appeals in the instant case is upheld, the door will be open to restrict or even nullify the Fourteenth Amendment through pro-

visions of the State Constitution, that were intended to safeguard the same rights. There will also be a conflict between the state and federal interpretations of the same principle. We request this court to overrule the Kentucky court as to the Fourteenth Amendment, and its effect will be to harmonize that Amendment with the Kentucky Constitution. We fail to see how the two constitutional provisions could be separated. They are indissolubly linked with each other. What violates one violates the other.

This court will take notice of its decision in the case of Abie State Bank v. Bryan, 281 U. S. 765, 51 S. Ct. 252, 75 L.Ed. 690. In that case, some banks sued to enjoin the Governor of Nebraska and the Secretary of the Department of Trade and Commerce of that state from collecting special assessments under the State Bank Guaranty Law. The injunction was granted by the lower court and reversed by the Supreme Court of Nebraska. The banks appealed to the United States Supreme Court and it was argued that the Supreme Court had no jurisdiction because the Nebraska court had rested its ruling on an independent, non-federal ground. Actually, the Nebraska court had said that the levy on banks provided by the statutes did not constitute the taking of private property without due process of law under the Fourteenth Amendment and that, furthermore, the banks were estopped to complain about the law because they had accepted benefits arising from deposits of money pursuant to the terms of the guaranty law. The Supreme Court was not impressed by this argument and expressed the opinion that it did have jurisdiction. While it might be true that the decision of the Nebraska court rested upon both federal and non-federal grounds, the two questions were so interwoven that the federal question could not be evaded.

That is the situation here. The Court of Appeals of Kentucky has clearly said that Section Two of the Kentucky Constitution and other sections of that document are

substantially the same as the Fourteenth Amendment. In view of the pronouncement and interpretation by the Kentucky court of its own Constitution, how can this court decline to take jurisdiction?

B. Respondent was convicted of violating KRS 118.340 in a federal election.

In our oral argument before the Court of Appeals and in our petition for rehearing we showed that respondent had been convicted for violating KRS 118.340 in the election of November, 1944, and it was in this election that the presidential electors of the United States, a United States Senator, and a Member of the House of Representatives were chosen. The fact that the 1944 election was a federal one is also brought out on page 2 of the Transcript of Evidence. Furthermore, it is and always has been a matter a common knowledge that the November, 1944, election was a federal one. We think it anomalous that a statute which protects the voting privileges of Kentucky citizens in a federal election should be struck down by a state court.

The Federal Constitution protects the right of a citizen to vote in an election in which presidential and vice-presidential electors and members of the United States Congress are elected.

In Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L.Ed. 987, decided by the United States Supreme Court in 1943, the question at issue was the right of a Negro to vote in a primary, although a state convention made up of white citizens had limited party membership to white citizens. In declaring that a Negro had this right, the court enunciated the principle which had already become generally established in Supreme Court decisions, that the right to vote in a primary election and a general election, when federal officers are chosen, is protected by the privileges and immunities clause of the Fourteenth Amendment. At this

point we refresh the memory of this court by quoting Section 1 of the Fourteenth Amendment, as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due provision of law; nor deny to any person within its jurisdiction equal protection of the laws."

In the 1940 case of the United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L.Ed. 1368, rehearing denied, 314 U. S. 707, 62 S. Ct. 51, 86 L.Ed. 565, the Supreme Court said that the right to choose Congressmen "is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. Ex parte Yarbrough, 110 U. S. 651; U. S. v. Mosley, 238 U. S. 383."

The right to choose Congressmen, the court went on, is guaranteed by Article I, Sections 2 and 4 of the United States Constitution.

The case of Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L.Ed. 97, decided in 1908, also declared that the right to vote in a federal election is a right and privilege protected by the Fourteenth Amendment. This case involved the right against self-incrimination and not the right to vote, but in dicta the court remarked that, among the rights of naturalized citizens by the Supreme Court, is "the right to vote for National officers. Ex Parte Yarbrough, 110 U. S. 651; . . .".

The same court, in Wiley v. Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L.Ed. 84, said in 1900 that the right to vote for Congressmen "has its foundation in the Constitution of the United States" and that the federal courts had jurisdiction over a suit by the voter against the board of

managers of a general election at a ward or precinct to recover damages for wrongfully rejecting his vote.

The principle that the right to vote in a federal election is a right of a citizen of the United States was also expressed in In re: Quarles and Butler (1894), 158 U. S. 532, 15 S. Ct. 959, 39 L.Ed. 1080, and Ex Parte Yarbrough (1883), 110 U. S. 651, 4 S. Ct. 152, 28 L.Ed. 274. KRS 118.340 thus protects the exercise of the right of a citizen of Kentucky and also the right of a citizen of the United States.

If the decision of the Kentucky Court of Appeals is allowed to stand, that decision will result in the infringement of a right guaranteed by the Constitution of the United States to citizens of the United States. It will mean that employees when they vote in federal elections will be subject to penalties for so voting, and they will not be on the same equal plane as employers, self-employed persons, or other voters who have control over their own time. It will mean that an employee may hesitate to cast his vote in a federal election, because of fear that he may incur a diminution of wages. In the case of employees who have no time to vote, other than the time during which they are working, the probability of reduction in wages might well be a deterrent to voting, and the right guaranteed by the Fourteenth Amendment to the United States Constitution would fade into insignificance.

III. KRS 118.340 DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION

Departing from the question of jurisdiction, we approach the merits of this case. In striking down KRS 118.340, the Court of Appeals referred to two portions of the Fourteenth Amendment—that provision which prohibits a state from depriving any person of his property without due process of law, and that which prohibits a

state from denying to any person in its jurisdiction the equal protection of the law. In both respects, the Court of Appeals has committed error.

A. The police power of the state extends to protection of the right to vote.

The Fourteenth Amendment was never intended to freeze and make static a particular economic or political factual situation, nor was its purpose ever to thwart the popular will in matters designed to make more perfect the republican form of government. It cannot be used now to exalt private property rights over the right of a citizen, regardless of his economic status, to participate in an election. This is all the more true in the case of an election —like that of November, 1944—at which presidential electors, a United States Senator and a Member of the Congress, were chosen. If KRS 118.340 is held to contravene the Fourteenth Amendment, that amendment will be stretched far beyond not only the intention of the framers of that amendment but all the interpretations of this court. In prohibiting an employer from diminishing the wages of his employee who, under reasonable regulations laid down by him as employer, takes time off in which to vote, KRS 118.340 safeguards the right of the individual to vote.

Respondent will maintain that voting is a mere private right in which a state has no interest, but he is wrong. It is of vital interest to a Commonwealth that it have an alert and active electorate. The public interest requires as many persons as possible to vote. It follows that anything which would discourage voting or make it impossible for a person to vote is against the best interests of the Commonwealth because it strikes at the very vitals of our democracy.

It is universally recognized that the Fourteenth Amendment did not vitiate the police power of the state. The day has long since passed when the police power of a state was limited to the protection of morals, safety and

health. Changing conditions have compelled the courts to broaden the interpretation of police power. In a frontier community, there was no need for a law like KRS 118.340, but modern conditions have made such a law necessary. No lengthy discussion is needed to show that a very large segment of the population is in the employee class, and that an employee is not always the master of his own time.

The current view of police power is to be found in 11 Am. Juris., Constitutional Law, section 270, page 1031:

> "In connection with the exercise of the police power, the public welfare embraces a variety of interests calling for public care and control. These are the primary social interests of safety, order, and morals, economic interests, and nonmaterial and political interests. In this field the legislature may prohibit all things hurtful to the welfare of society or detrimental to the public interests. On the other hand, a legislature cannot, under pretense of exercising the police power, enact a statute which does not actually concern the welfare of society. When there is no fair, just, and reasonable connection between the law and the common good, and it is manifest that such was not the object of the statute, it will not be sustained. The mere restriction of liberty or of property rights cannot, of itself, be denominated public welfare and treated as a legitimate object of the police power."

And on page 1014, at section 270 (Supplement) these words can be found:

> "While formerly the police power was viewed as one of strict and direct application, it has now come to be more favored because of changed and changing economic and social conditions and at present is frequently relied on to sustain laws which affect the common good in only an indirect way." Shea v. Olson, 185 Wash. 143, 186 Wash. 700, 53 P. (2d) 615, 69 P. (2d) 1183, 111 A.L.R. 998, is cited.

KRS 118.340 is a legitimate exercise of police power of the state because the safeguarding of voting is a matter of public welfare.

Even when an employer is required to pay his employees when they take time off from their regular work in order to vote, there are few things in our lives that are more important than freely to exercise our right of suffrage and, because we have a republican form of government, it is not only the right, but the duty, of the legislative body to do everything it can to encourage the electorate to take an interest in voting. It must not only encourage voting, but it must protect it.

In Application of Robinton, 218 N.Y.S. 3, 128 Misc. 163, a New York court said:

> "The right of suffrage under our form of government is inviolate and every protection should be thrown about free and proper exercise of that right which is the power of the court."

If an employee were allowed time off from his work without being paid for the time in order that he might vote, the privilege of voting which KRS 118.340 has sought to protect would suffer. Voting would be discouraged because an employee would be faced with the unpleasant alternatives of staying on the job, earning his pay, and thereby failing to discharge his duty as a citizen, or leaving his work, forfeiting his pay, and voting. Under our economic system as it existed in 1892, the year in which the statute was passed, and as it has existed since that time, many employees are not free, from an economic standpoint, to stay away from work whenever they wish. If the statute is held unconstitutional, the employee might well think that he cannot take time off to vote. This would place an undue burden upon a class of society which contains some of our most intelligent, sincere and loyal citizens.

Respondent may assert, as he has asserted before the Kentucky Court of Appeals, that one class of voters is

being subsidized at the expense of another and smaller class of voters. Respondent mistakes the form for the substance. No subsidy is granted employees for taking time off to vote. Instead, there is an attempted equalization of status. Both the framers of the 1891 Constitution of Kentucky and the General Assembly of 1892 wanted to remove disabilities of the working class. By doing so, they made all citizens and voters equal before the law.

Nor can it be argued that by means of KRS 118.340 the sovereign is providing its citizens with inducement to vote. It is simply removing the inequality which would exist if they were not paid. This statute is not out of line with the general policy followed by a number of states. The state is interested enough in elections to pay for elections. It has passed laws providing for the fair conduct of elections and the accurate and honest counting of votes. Election officers are paid for in nearly every session of the Kentucky General Assembly, and, we presume, in the legislature of nearly every other state the sovereign attempts to make voting easier, more efficient, and more honest.

It may also be charged that KRS 118.340 reflects upon the ability and earning capacity of employees because those employees are not considered equal before the law with any other qualified voters. That argument loses sight of the true significance of KRS 118.340. As we have pointed out above, the statute does not subsidize employees, but, in the case of respondent, puts them on the same level with respondent's president and its numerous vice-presidents.

A statute such as this would not mean much to employees who were paid by the week, the month or the year. Executives of a corporation such as respondent, for example, could easily vote on company time and no one would ever think of docking them.

The statute has simply recognized that if the executives may cast their vote on company time, other employees should be allowed to do so, likewise.

We request this court to note that only two state courts have passed upon a question like this and each has held a different way. In the Illinois case of People v. Chicago, Minneapolis, and St. Paul Railway Co., 306 Ill. 486, 138 N. E. 155, 28 A.L.R. 610, the highest court of Illinois in 1923 invalidated a statute which follows the Kentucky statute almost verbatim, with the exception that the Illinois statute gave two hours in which to vote while the Kentucky statute gave four hours. The court based its opinion on the Fourteenth Amendment to the United States Constitution. There, too, an employee was paid by the hour. The Fourteenth Amendment to the Federal Constitution, the Illinois court said, prohibited a state from abridging property rights and that, according to it, was what the statute did to an employer.

We submit that this decision represents an antiquated viewpoint and one which is out of step with the times. We even think that if this case were to come up before the Illinois court today, a different decision would be handed down. The Illinois courts have shown a tendency to restrict the application of the case upon which respondent probably will rely and upon which the Court of Appeals of Kentucky has relied. In Zelney v. Murphy, 387 Ill. 492, 56 N. E. (2d) 754, decided in 1944, the highest court of that state considered an attack which had been made upon an Illinois unemployment compensation commission act on the ground that it violated the State Constitution and the Fourteenth Amendment to the United States Constitution in taking away private property for private use. The Chicago, etc., Railroad Company case, supra, was brought up by an employer who was challenging the act, but the court was not impressed by his argument. The Court pointed out that that very statute which had been declared invalid in the older case had been reenacted and amended and the right of the employee to be paid for time consumed in voting was *still* to be found in the lawbooks. The older case and McAlpine v. Dimick, 326 Ill. 240, 157 N. E. 235, which

followed the first case, were held not to be controlling here "and especially in view of the growing appreciation of public needs and of the necessity of finding ground for rational compromise between individual rights and public welfare. The growing complexity of our economic interests have inevitably led to an increased use of regulatory measures in order to protect the individual, so that the public good is reassured by safeguarding the economic structure upon which the good of all depends."

On June 26, 1946—twenty-three years, be it noted, after the Illinois decision—the Appellate Division of the Supreme Court of New York handed down a decision in the case of People v. Ford Motor Company, 271 Appellate Div., 141, 63 N.Y.S. (2d) 697. That case concerned the constitutionality of the New York Penal Law, Section 759, which prohibited the subjecting of employees to a reduction of wages on account of absence from work while exercising the privilege of attending a general election. The New York court upheld the statute and pointed out that protection of the voting privilege was a legitimate exercise of the police power of the state. Concerning this exercise of police power, the New York court uttered these words:

> "An employer-employee relationship may be said to have in it such a power of dominance on the part of the employer as is capable of thwarting the wholesome exercise of the right to vote at an election. The fact that such abuses have occurred is historical. To avoid such evils, to encourage the right of suffrage, to keep it pristine and render it efficient—all this pertains to the public welfare and, in the attainment of those objectives, the burden which the statutes cast upon all in the role of an employer is one lawfully placed in a design for the common good, and the burden is so slight that it may not be said to be unduly oppressive. That the burden may bear unequally does not render its placement unlawful. Chamberlin, Inc. v. Andrews, 271 N. Y. 1, 2 N. E. 2d 22, 106 A. L. R. 1519."

We think this case is squarely in point and of far greater authority than the Illinois case which the Kentucky Court of Appeals discusses.

Cases may be cited holding that tests of and prohibitions on legislation should be considered with reference to public interest so as not to interfere unduly with private business or to impose unusual or unnecessary restrictions on unlawful occupations. That is true, but is it not also true that a private business, such as that of respondent, has a definite stake not only in the maintenance of the democratic system, but the improvement of it? That it has, we do not doubt. Why, then, should a private business object to a measure which makes smoother the operation of the machinery of democracy? If respondent carried on its business in a totalitarian state, this question would not arise, for respondent would not have to pay its employees for time taken off to exercise their right to select their own public officials. It is to the interests of the state and the community to have as many people vote as possible; and if an employer must pay wages to an employee and that employee has availed himself of KRS 118.340, that is just the price the employer must pay for living in one of the United States.

It may also be charged that in enacting KRS 118.340 the General Assembly has invaded the inherent rights of employer and employee to make employment contracts and has required employer to pay money not earned, on the ground that such action is an incentive, or an inducement, to the employee to discharge a public duty resting upon the employee alone.

That is not the case. When an employee or his union and respondent, as employer, made the employment contract, both sides must have been fully aware that the now designated KRS 118.340 was on the statute books. As we have pointed out before, payments to employees for time taken off for the purpose of voting is not an incentive, or

inducement, but is an attempted equalization of status. In the exercise of its police power, the state may make such equalization. The state's police power, as respondent will no doubt readily concede, rests not upon any private interest but upon public considerations. Those considerations constitute the basis of KRS 118.340 and it is to the interest of society that one class be not discriminated against in the exercise of its right to vote. That is all KRS 118.340 does. It removes the disability and allows the working-man to steer his way safely between the Scylla of not voting and the Charybdis of losing money in order to vote.

In many cases too numerous to cite individually the Supreme Court of the United States has held that the restrictions imposed by the Fourteenth Amendment on the states do not affect legitimate exercise of the states' police power. Of course, it is frequently difficult to draw the line between an exercise of the police power and the protection of the property rights of the individual, but we believe that in this case KRS 118.340 clearly lies within the scope of the police power. We have pointed out before that the state has an interest in the purity of elections. Surely the Fourteenth Amendment cannot be stretched so far as to prevent a state from attempting to keep its elections pure.

Let us assume, for the sake of argument, that the state has no power to compel an employer to pay his employees for time taken off to vote. The employer, then, would have the right to refuse to pay his employees for the time taken off to vote, but he would also have the right to pay them if he wished. An unscrupulous employer, eager to influence the outcome of an election by means of economic pressure, could pay certain employees and withhold pay from others. He could pay those employees who were sure to vote the way he wanted them to vote, and could decline to pay other employees who might vote differently. Employees who could not be relied upon to vote the way the employer

wanted them to vote, could therefore be forced not to vote at all.

In order to make sure that this particular pressure could not be applied, the Legislature decided to strike at the whole evil and require pay generally. It wanted to make employees as free as possible.

B. KRS 118.340 does not deprive a person of property without due process of law.

A state may pass and enforce such laws as will protect the health, safety, morals and general welfare of the people without running against that clause of the Fourteenth Amendment which prohibits any state from depriving any person of life, liberty or property without due process of law.

In Bayside Fish Flour Co. v. Gentry, 297 U. S. 422, 80 L. Ed. 772, 56 Sup. Ct. 513, decided by the United States Supreme Court in 1935, the question of due process of law was brought up. There the State of California had promulgated a fish and game code which prohibited manufacturers from allowing the deterioration or waste of fish taken in the waters of the state or brought into the waters of the state or using any fish or part of a fish except fish offal in a reduction plan or by reduction process. The Code also provided that sardines might be taken for use in a reduction plant only in certain districts and between certain dates and licenses were required for this purpose. A certain company bought sardines from fishermen who had caught them on the high seas beyond the three mile limit and had manufactured from the sardine meat, fish flour for human consumption. This company challenged the constitutionality of the fish and game code.

In the Bayside case the court noticed that statutes had to have reasonable relation to their objects. If statutes do not have such a reasonable relation, the due process of law clause will invalidate them. Said the court in the Bayside Fish Flour Company case:

"* * * we cannot invalidate them because we might think * * * that they will fail or have failed of their purpose. McLean v. Arkansas, 211 U. S. 539, 547-548. Nor can we declare the provision void because it might seem to us that they enforce an objectionable policy or inflict hardship in particular instances. Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 77. And see, generally, Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549. 'Whether the enactment is wise or unwise,' this court said in that case (page 569), 'whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.' "

The Kentucky Legislature has thought it wise to protect the right of franchise in this particular manner. Whether it might have chosen a more effectual method of attaining this object is not for this court to determine. The important point is that it saw an evil and attempted to correct it. We think there is a reasonable relation between the statute and its object. The object is to keep elections pure and equal and the method used was to prevent discrimination against employees for voting. We do not see how that can be called unreasonable.

C. KRS 118.340 denies no one equal protection of the law.

11 Am. Juris., Constitutional Law, section 263, reads in part as follows:

"The clause of the Fourteenth Amendment forbidding any state to deny to any person within its jurisdiction the equal protection of the laws does not limit and was not designed to limit the police power of the state, nor does it affect a proper exercise of such power."

There is nothing arbitrary or capricious about the application of KRS 118.340 to employees. All persons in

the employer class are treated alike by KRS 118.340 and we do not see how this can contravene the Fourteenth Amendment. There is nothing revolutionary in laws covering only the employer or employee class. Statute books are full of such laws and they have been repeatedly upheld.

One of the most important of the cases on this subject is that of Minneapolis and St. Louis Railroad Co. v. Beckwith, 129 U. S. 26, 9 S. Ct. 207, 32 L. Ed. 585, decided in 1889. That case involved a railroad law allowing an action for the destruction of livestock by trains and the law was upheld. We quote from page 29 of that opinion:

> "Equality of protection implies not merely that accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights but equal exemption with others in like condition from changes and liabilities in every kind. But the clause does not limit, nor was it designed to limit, the subjects upon which the police power of the State may be exerted. The State can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease and danger, in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society."

Such is our situation. In its judgment, the General Assembly of Kentucky has decided that the voting privilege of the employee class must be protected. There can be no denial of equal protection of laws here.

The Kentucky Court of Appeals in the 1891 case of Schoolcraft, Administrator v. L. & N. R. Co., 92 Ky. 233, 17 S. W. (2d) 567, 14 L.R.A. 579, construed the equal protection clause of the Federal Constitution in line with the

general pronouncements of this court. At issue was the constitutionality of a law providing that if the life of any person not employed by a railroad company should be lost through the negligence of the proprietor of the company or the unfitness, negligence or carelessness of its agents, the personal representative of the deceased might sue and recover in the same manner as the deceased might have done had he been alive. The court found no denial of equal protection. The equal protection clause in the Fourteenth Amendment, said the court, did not affect the police power of the state. It was a sound principle, of course, that a law should determine equal rights and privileges and should afford the same rule for the rich and the poor, the high and the low, but control of railroad companies was necessary for the protection of the people. The statute did not single out a particular business to certain rules. In a broad sense, the law was special legislation and yet not such special legislation as to place it within the constitutional limitation.

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation." Southern Railway Co. v. Green, 216 U. S. 400, 30 S. Ct. 287, 54 L.Ed. 536.

KRS 118.340 is not confined by its terms to corporation employers or to railroad companies or to individual employers. It refers to all employers and there can be no unreasonable classification in that.

See also Asbury Hospital v. Cass County, 326 U. S. 207, 66 S. Ct. 61, 90 L.Ed. 6.

CONCLUSION AND PRAYER

The Supreme Court of the United States has jurisdiction to issue a writ of certiorari to the Kentucky Court of Appeals because:

(1) The Kentucky Court of Appeals, in saying KRS 118.340 deprived employers of property without due process of law and denied them the equal protection of the laws, has decided a Federal question of substance not heretofore determined by this court, and in a way probably not in accord with applicable decisions of this court; and

(2) Respondent had been convicted of violating, in a federal election, a state statute designed to safeguard the right of franchise, and in holding that statute unconstitutional as against the Fourteenth Amendment, the Court of Appeals ruled in such a way as to impair a right guaranteed by the Federal Constitution.

As for the merits of the case, the Kentucky court has erred in holding that the state might not, under the Fourteenth Amendment, safeguard the right of franchise by prohibiting the diminution of wages of an employee who, after giving notice to his employer, and in accordance with the employer's reasonable regulations, takes time off in which to vote.

Wherefore we petition this court to issue a writ of certiorari to the Kentucky Court of Appeals.

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Counsel for Petitioner
Commonwealth of Kentucky

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CITATIONS.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

IN THE

Supreme Court of the United States

October Term, 1947.

No. 592.

COMMONWEALTH OF KENTUCKY, - - *Petitioner,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Respondent.*

On Petition for a Writ of Certiorari to the Kentucky Court of Appeals.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

FOREWORD.

Copies of the petition for a writ of certiorari in this case were served on respondent, Illinois Central Railroad Company, on January 6, 1948. Petitioner, however, has never served upon respondent a copy of the printed record as required by Rule 38 of this Court. Nevertheless, respondent, at the suggestion of the clerk of this Court and in order to avoid further unnecessary delay in terminating this litigation, is filing this response.

OPINION BELOW.

The opinion of the Court of Appeals of Kentucky which is called in question by petitioner is that of Illinois Central Railroad Company v. Commonwealth of Kentucky, 305 Ky. 632, 204 S. W. 2d 973.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner under the provisions of Section 237 of the Judicial Code (28 U. S. C. 344), as well as Rule 38 of the Rules of the Supreme Court.

As we shall presently show, this Court does not have jurisdiction of this case under the provisions referred to, or at all, under the facts disclosed by this record.

STATUTE INVOLVED.

The provisions of Section 118.340 of the Kentucky Revised Statutes are as follows:

> "Any person entitled to a vote at any election in this state shall, if he has made application for such leave prior to the day of election, be entitled to absent himself from any services or employment in which he is then engaged or employed for a period of four hours on the day of the election, between the time of opening and closing the polls. Such person shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages. The employer may

specify the hours during which the employe may absent himself. No person shall refuse an employe the privilege hereby conferred, or discharge or threaten to discharge an employe or subject an employe to a penalty or deduction of wages because of the exercise of the privilege."

STATEMENT OF CASE.

The statement of facts contained in petitioner's brief is substantially correct in so far as it goes. We, therefore, need only summarize the facts.

The Illinois Central refused to pay its employes in Kentucky for the time taken off by them to vote on election day, November 7, 1944. Consequently, some 176 indictments were returned against it in the Circuit Court for McCracken County, Kentucky, for the alleged violation of KRS 118.340 in its failure to pay its employes for time taken off by them to vote.

A typical case was selected for trial, viz., that of W. K. Wall. Under his contract of employment, Wall received $1.04 per hour for the hours he actually worked. He put in a claim against the Illinois Central for $2.08 for time alleged to have been taken off to vote by him on November 7, 1944. This claim was denied.

In the trial Court, as well as in the Court of Appeals of Kentucky, the Illinois Central asserted by way of defense, among other things, that KRS 118.340 was void, being in violation of Sections 1, 2, 6, 13, 19 and 26 of the Kentucky Constitution, and of Article 1, Section 10 and the Due Process and Equal Pro-

tection Clauses of the Fourteenth Amendment of the Federal Constitution.

The defendant was convicted in the McCracken Circuit Court in May, 1945, of violating the provisions of KRS 118.340. An appeal was taken to the Court of Appeals of Kentucky and the judgment of the lower Court was reversed on the ground that the indictment was defective (see I. C. R. R. Co. v. Commonwealth, 300 Ky. 817, 190 S. W. 2d 555).

Upon the return of the case to the McCracken Circuit Court, a second indictment was returned, and the defendant was again convicted and a fine imposed. A second appeal was taken to the Court of Appeals of Kentucky, which again reversed the case, holding that KRS 118.340 violated Section 2 of the Constitution of Kentucky, and also the Fourteenth Amendment to the Federal Constitution (see I. C. R. R. Co. v. Commonwealth of Ky., 305 Ky. 632, 204 S. W. 2d 973).

THE QUESTION PRESENTED.

The question raised and considered in the Court of Appeals of Kentucky was the validity of KRS 118.340. The principal, if not the only question, which is raised by the Petition for a Writ of Certiorari is as to the jurisdiction of the Supreme Court. To answer this question we must determine whether or not a Federal question was presented and decided by the Court of Appeals of Kentucky, and if so, whether the decision of the Federal question was necessary to the decision. If the decision of the Court of Appeals of Kentucky

was also rested upon another ground, which is adequate by itself and which involved no Federal question, this Court will not take jurisdiction.

We do not reach the question of validity of KRS 118.340 which was decided by the lower Court until the jurisdictional question has been disposed of.

SUMMARY OF ARGUMENT.

(1) The decision of the Court of Appeals of Kentucky was rested upon two grounds, one of which was Federal, the other non-Federal in character. The non-Federal ground was independent of the Federal ground and entirely adequate to support the decision. This Court is, therefore, without jurisdiction.

(2) The question which the petitioner is undertaking to submit to this Court is moot. The Court of Appeals of Kentucky has issued its mandate to the Circuit Court which, pursuant thereto, has dismissed the case. Both courts have lost the power to take any further steps in the case.

ARGUMENT.

In the language of Mr. Justice Frankfurter, "this Court will not review a State court decision resting on an adequate and independent non-Federal ground even though the State court may have also summoned to its support an erroneous view of federal law. 'Where the judgment of the state court rests on two grounds, one involving a federal question and the other not . . .

and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.' " (*Radio Station WOW* v. *Johnson,* 326 U. S. 120, 129).

An examination of the opinion of the Court of Appeals of Kentucky indicates conclusively that the decision of that Court was rested upon two grounds, one of which was Federal and the other non-Federal, and that the non-Federal ground was independent of the Federal ground and amply sufficient to support the decision.

After reviewing the facts and making some general observations, the opinion proceeds:

> "Ky. Constitution, Sec. 2, contains these words:
>
> > 'Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.'
>
> If we interpret the above constitutional provision correctly, it inhibits the legislative power of this state from arbitrarily passing a law taking property away from one person and giving it to another person without value received or without any contractual basis. And this inhibition still stands, regardless of the merit or glory or value or need of the person on the receiving end of the transaction. Hardly a more worthy objective could be designed than that of building a great hospital for crippled children of all creeds and colors, a marvelous, public enterprise, and yet the constitution would not sanction a law saddling the burden of such an undertaking upon the farmers of Kentucky to the exclusion of its butchers, bak-

> ers and candlestick makers. Such a law would constitute an exercise of arbitrary power over the property of that group of freemen known as farmers. Its arbitrariness would lie in its unfairness and in its preferment. The law will not countenance a public maintenance of a private enterprise. Neither should the law demand a private maintenance of a public enterprise. Voting is a public enterprise. But if its maintenance is required by the employer group rather than by the entire, broad, general public, then that amounts to a requirement of private maintenance of a public enterprise."
>
> (305 Ky. 632, 634; 204 S. W. 2d 973, 975.)

There can be no doubt that by the foregoing language the Kentucky Court held that KRS 118.340 violated Section 2 of the Kentucky Constitution and was therefore void.

Section 2 of the Kentucky Constitution is a part of the Kentucky Bill of Rights. Section 26 of the Kentucky Constitution provides:

> "To guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void."

The Kentucky Court of Appeals is the final authority as to the effect of the provisions of the Kentucky Constitution. Since it has held that KRS 118.340 violates that Constitution, the statutory provision is void

and without effect and there is nothing left for this Court to decide with respect to it.

The opinion proceeds:

> "We also believe that the wage-payment-for-voting-time provisions of this statute are antagonistic to the United States Constitution, particularly that provision which says that no state shall deprive any person of his property without due process of law or deny to any person in its jurisdiction the equal protection of the law."
>
> (305 Ky. 632, 635; 204 S. W. 2d 973, 975.)

The opening words of the foregoing quotation, viz., "We *also* believe," indicate clearly that the decision of the Court with respect to the Federal question was entirely separate and distinct from its decision with respect to the non-Federal question, viz., the validity of KRS 118.340 under the provisions of the State Constitution. The finding that the State statute violates the provisions of the State Constitution, and is therefore void, is an adequate ground (and it is a non-Federal ground) to support the decision of the Kentucky Court.

In *New York City, et al.,* v. *Central Savings Bank, et al.,* 306 U. S. 661, the memorandum opinion states:

> "Petition for writ of certiorari to the Supreme Court of New York denied for the reason that the judgment sought to be reviewed rests upon a non-federal ground adequate to support it."

The opinions of the New York Court (278 N. Y. 266, 280 N. Y. 9, 18 N. E. 2d 151, 19 N. E. 2d 659)

show that the question involved was the constitutionality of Chapter 713 of the laws of the State of New York of 1929, known as the Multiple Dwelling Law. Its constitutionality was questioned both under the State and Federal Constitutions. The New York court held that it violated Article I, Section 6 of the Constitution of the State of New York in that it constituted a taking of property without due process of law, and also that it violated the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States for the same reason. The finding of invalidity under the State Constitution was held a sufficient non-Federal ground to sustain the judgment, and certiorari was denied. The situation in the present case is identical. This Court should deny the present petition because "the judgment sought to be reviewed rests upon a non-Federal ground adequate to support it."

The principles upon which we are relying are so well-settled that we feel further discussion would be an imposition on this Court. See:

New York City, et al., v. *Central Savings Bank, et al.*, 306 U. S. 661,
Klinger v. *State of Missouri*, 13 Wall. 257,
Fox Film Corporation v. *Muller*, 296 U. S. 207,
Richardson Machinery Co. v. *Scott*, 276 U. S. 128,
Enterprise Irrigation District, et al., v. *Farmers Mutual Canal Co., et al.*, 243 U. S. 157.

THE CASE IS MOOT.

The Civil Code of Practice of Kentucky provides (§760):

> "The Court of Appeals may make rules for the convenient dispatch of business, the preservation of order, the argument of cases or motions, and the manner and time of presenting motions or petitions for rehearing, therein; and the time for issuing its mandates and decisions, and the mode of enforcing its mandates and orders, and may change the same: *Provided,* That no mandate shall issue, nor decision become final, until after thirty days, excluding Sundays, from the day on which the decision is rendered, unless the court, in delay cases, otherwise direct; and, if said thirty days expire during a vacation or recess of the court, a written order of one of its judges, filed in its clerk's office, within said thirty days, shall have the same effect to suspend the mandate, by allowing a petition for a rehearing to be filed, or by allowing time to file such petition, as if such order were made by the court."

Pursuant to the authority contained in the above provision, the Court of Appeals of Kentucky had adopted certain rules. Rule 1.050 has to do with "Terms of Court," and is as follows:

> "Three terms of Court will be held each year, to be known as the winter, spring and fall terms, beginning respectively on the first Monday in January, the second Monday in April and the third Monday in September. When the first Monday in January falls on the first day of January, the term

will begin on the next day. There will be a two weeks' vacation at the close of the winter and fall terms, respectively. The spring term will close on the Friday following the third Monday in June."

Rule 1.520 has to do with "Rehearings," and is as follows:

"Whenever a motion is made for an extension of time within which to file a petition for rehearing, whether by agreement or otherwise, the motion shall state the reasons for requesting such extension, and the motion will only be granted if the reasons shall be good and sufficient. When the time to file such petition is extended and the time expires during vacation, or where the court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition in the Clerk's office within the time shall be held sufficient. Petitions for rehearing may also be filed with notice in the Clerk's office on any day of the term to have the same effect as if filed in Court on that day. The Clerk, however, has no right to extend the time for filing and this can only be done by an order from one of the judges, filed in the Clerk's office before the mandate issues."

The opinion of the Court of Appeals which the petitioner seeks to have this Court review was delivered on June 3, 1947. The Commonwealth, through its Attorney General, obtained an extension of time within which to file Petition for Rehearing to August 1, 1947. The Petition for Rehearing was overruled on November 14, 1947. On the same day the Court of Appeals of Kentucky issued its mandate to the Circuit Court

directing that judgment of the latter court be set aside.*

The Court of Appeals of Kentucky adjourned on December 19, 1947. Its Fall Term ended on that day. On January 5, 1948, under the rules of that Court, the Winter Term began. During the Fall Term the Court of Appeals had authority to recall the mandate which it had issued during that term. When that term ended it lost all power to take any further steps in the case.

The principle that a Court loses jurisdiction of a case upon the termination of the term at which it has entered a final order is well settled. It has been recognized for many years by the Kentucky Court of Appeals:

Bradford v. *Patterson,* 1 A. K. Marsh. (8 Ky.) 464.

Beazley v. *Mershon,* 6 W. P. D. Bush (69 Ky.) 424.

The principle has been recognized by the Federal Courts also:

Hazel-Atlas Glass Co. v. *Hartford-Empire Co.,* 322 U. S. 238, 244.

Bronson v. *Schulten,* 104 U. S. 410, 415.

Standard Asphalt Co. v. *American Surety Co.,* 5 Fed. Supp. 430.

*The mandate issued by the Court of Appeals on November 14, 1947, was filed in the McCracken Circuit Court on December 8, 1947, and on that date the Circuit Court entered an order terminating the case. Although these facts may not appear in the record which has not been served upon us, they are facts of which we feel this Court should be apprized.

No attempt was made by the Commonwealth prior to the end of the Fall Term of the Court of Appeals of Kentucky to stay the proceedings in that Court, as permitted by U. S. C., Title 28, Section 356.

The Commonwealth here seeks from this Court a Writ of Certiorari to the Court of Appeals of Kentucky. Neither that Court nor the Circuit Court in which this case arose has power to enter any order or to take any further steps in this case either at the direction of the United States Supreme Court or of any other tribunal. The action of this Court either in granting the petition or in considering the case on the merits would, therefore, be utterly futile.

CONCLUSION.

For the reasons hereinabove set out, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

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